No. 20991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN B. KAPELUS and CRENSHAW CARPET CENTER, INC.,

Appellants,

vs.

A JOINT VENTURE OR COPARTNERSHIP composed of JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN, LEATRICE FRANKLIN and FLORENCE FITZGERALD, also known as FLORENCE JAMES, as Joint Venturers or Copartners, and JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN, LEATRICE FRANKLIN and FLORENCE FITZGERALD, also known as FLORENCE JAMES, individually,

Appellees.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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PETITION FOR REHEARING.

Pursuant to Rule 23, Ninth Circuit Court, the Appellants herein respectfully petition for a rehearing on the following grounds:

1. Appellants believe that this Court failed to consider the fact that the issues tried and determined by the Referee in this case were already pending trial in the state court, where the Debtors (Appellees) had first initiated an action to have the deed declared a mortgage and to quiet title [Rep. Tr. Vol. IV, pp. 449-450].

The Bankruptcy Act, Chapter XI, Section 314, gives the Bankruptcy Court only the power to *enjoin* or *stay* actions in the state court and not the power to seize jurisdiction over the controversy itself. The Courts are unanimous in holding that such a seizure is improper.

> "The court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property . . . When this jurisdiction has attached, the court's possession cannot be affected by actions brought in other courts. . . ."
>
> "It is fundamental that one court may not wrongfully take away from the other in whose custody it is, possession of a res and then 'claim jurisdiction over the property because it is in the possession of the court' ".
>
> *Bryan v. Speakman,* 53 F. 2d 463.

> "The possession of the res vests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto . . . Nor is the rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court . . . the rule has been declared to be of especial importance in its application to Federal and state courts."
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> *Farmers Loan and Trust Company v. Lake Street,* 177 U.S. 51.

> "The trustee contends that, since the property was in the possession of the bankrupt when the petition in bankruptcy was filed, the case falls within the well-established rule permitting summary jurisdiction of the controversy in such circumstances . . .

> This contention disregards the fact that by the foreclosure suit the state court had already taken constructive possession of the property. Possession of the res vests the court which first acquires jurisdiction with power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. Nor is the rule limited to cases where actual control has been exercised in the first suit before the second is instituted; it extends as well to a suit in which the court may do so in the progress of litigation. . . . The principle that one court will not snatch a res from another's mouth is equally applicable to a court of bankruptcy."
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> *In re Greenlie-Halliday Co.*, 57 F. 2d 173.

2. This Court has stated that it will not disturb the "Referee's determination" of the question of possession. The evidence is clear that the Referee in fact made no such determination. His decision on summary jurisdiction [beginning at Volume XIV, page 1678, of the Reporter's Transcript] was that he had summary jurisdiction only for the following reasons:

> "At this time the Court finds that the transaction was nothing more than a security transaction." [Page 1583, lines 18, 19].
>
> "We conclude that the debtors acting in a capacity of a Receiver as of now had an equitable ownership in this property from the date that they made the valid and legal tender of money at Mr. Kapelus' office on the 21st of January, 1964 . . . Then they have had equitable ownership throughout this period of time up until the date that they went into Chapter XI which was on August 26, 1964." [Page 1688, lines 11-22].

"Basically, we conclude we have summary jurisdiction based on the Chapter XI Proceeding, Section 311 and the California Code Sections which we have had to construe together with the cases."

"Looking to all the facts and circumstances coming up to the intent of the party basically it was stated as a security transaction was the intent of the parties from the beginning." [Page 1694, lines 12-19].

3. This Court has affirmed a finding of summary jurisdiction with the statement that the evidence is sufficient that the Debtors (Appellees) were in actual possession of the subject property, but refers to only one act which might indicate a right to possession in the Appellees—that they "removed signs . . . from the property". Said statement is not supported by the evidence, which actually shows that the Debtor Franklin admittedly did not know when this sign was removed [Rep. Tr. Vol. IV, p. 448]. The evidence actually shows that the subject property was totally unimproved, unoccupied, unused, and not susceptible to physical possession by anyone [Rep. Tr. Vol. IV, p. 440].

4. This Court has stated as a fact that "the property was worth ten to twenty times the value of the antecedent debt". Assuming that the Court is referring to the option price of $20,500.00 as "the antecedent debt" (which was actually $9,461.81), the record contains no evidence to establish such a property value. The *only* remotely qualified evidence was by an appraiser presented by *Appellees* who testified that the property had a total value of $150,000.00 [Rep. Tr.

Vol. X, p. 1247]. Against the property was a trust deed with a balance due of approximately $85,000.00. Furthermore, the evidence shows clearly that the subject property was transferred *in exchange* for another property which the Debtors subsequently were able to encumber for at least $135,000.00.

Respectfully submitted,

JOHN P. STODD,
Attorney for Appellants.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

JOHN P. STODD,
Attorney for Appellants.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of June, A.D. 1967.

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